Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-170

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL UNION NO. 701,
Petitioner,

v.

H. A. ANDERSEN CO., INCORPORATED, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

ROBERT J. MILLER
TERRY G. DESYLVIA
BLACK, KENDALL, TREMAINE,
BOOTHE & HIGGINS
3100 First National Bank Tower
Portland, Oregon 97201

Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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IN THE

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OCTOBER TERM, 1976

No.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 701,
Petitioner,

v.

H. A. ANDERSEN CO., INCORPORATED, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

International Union of Operating Engineers, Local Union No. 701 prays that a Writ of Certiorari issue to review the order of the Temporary Emergency Court of Appeals entered on July 8, 1976, dismissing the appeal filed in this case.

OPINIONS BELOW

The order of the Temporary Emergency Court of Appeals dismissing the appeal in this case is unreported. It is printed in the appendix beginning on page 1a.

JURISDICTION

The order of the Temporary Emergency Court of Appeals dismissing the appeal and refusing to accept a transfer of the appeal from the Ninth Circuit was entered on July 8, 1976. This court has jurisdiction to review the order by Writ of Certiorari under 28 U.S.C. § 1254(1) and § 211(g) of the Economic Stabilization Act of 1970, as amended, Pub. L. No. 92-210, § 2, 85 Stat. 750 (1971).

QUESTION PRESENTED

Does a court of appeals have jurisdiction to hear an appeal by accepting a transfer of the appeal or by accepting the filing of a modified notice of appeal when the notice of appeal was filed and served upon the appellee within the time required by law, but was erroneously filed in the wrong court and directed to the wrong court of appeals?

STATUTES AND FEDERAL RULES OF PROCEDURE INVOLVED

Statutes

28 U.S.C. § 1291. Final decisions of district courts.

"The courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court."

28 U.S.C. § 1294. Circuits in which decisions reviewable.

"Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

"(1) From a district court of the United States to the court of appeals for the circuit embracing the district.;"

Economic Stabilization Act of 1970, § 211(b)(2) as amended, Pub. L. No. 92210, § 2, 85 Stat. 749 (1971), Judicial Review.

"Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder. Such appeals shall be taken by the filing of a notice of appeal with the Temporary Emergency Court of Appeals within thirty days of the entry of judgment by the district court."

Federal Rules of Appellate Procedure

Rule 3(a). Filing the Notice of Appeal.

"An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. . . ."

Rule 4(a). Appeals in Civil Cases.

"In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals, the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the

date of the entry of the judgment or order appealed from. . . ."

Rules of The Temporary Emergency Court of Appeals

Rule 1. Scope of Rules.

"These Rules govern the procedure in the Temporary Emergency Court of Appeals of the United States. Except as to matters specifically covered by these Rules, the Federal Rules of Appellate Procedure shall govern the procedure in all cases or proceedings in this court. The Rules shall be constructed to secure the just, speedy and inexpensive determination of every action."

Rule 15(a). Notice of Appeal.

"A notice of appeal in any civil or criminal case arising under the Economic Stabilization Act of 1970 as amended . . . shall be filed with the clerk of this court within 30 days of the entry of judgment by the district court. This time limitation shall be binding upon both government appeals and private appeals."

STATEMENT OF THE CASE

On March 2, 1976, the United States District Court for the District of Oregon entered its judgment in favor of the plaintiff and against the petitioner, International Union of Operating Engineers, Local Union No. 701, for compensatory damages of $79,694.00, punitive damages of $50,000.00 and attorneys' fees in the amount of $74,000.00. The complaint upon which the judgment was based alleged a work stoppage and stated two counts, one for breach of contract and one for alleged violation of the Economic Stabilization Act of 1970.

On March 24, 1976, the petitioner filed a notice of appeal with the United States District Court for the District of Oregon. The notice stated that the appeal

was to the Court of Appeals for the Ninth Circuit. The plaintiffs were promptly served with a copy of the notice. The district court forwarded the notice to the Ninth Circuit. On April 19, 1976, the plaintiffs filed a notice of cross-appeal.

On May 10, 1976, the plaintiffs filed a motion with the Court of Appeals to dismiss the appeal upon the ground that § 211(b)(2) of the Economic Stabilization Act of 1970 gave the Temporary Emergency Court of Appeals exclusive jurisdiction to review the judgment. On May 19, 1976, the petitioner filed a motion with the Court of Appeals for the Ninth Circuit requesting that the appeal be transferred to the Temporary Emergency Court of Appeals. That motion is printed in the appendix at page 3a. On May 25, 1976, the petitioner filed a modified notice of appeal with the Temporary Emergency Court of Appeals along with a motion requesting that court to accept transfer of the appeal from the Ninth Circuit. That motion and the modified notice of appeal are printed in the appendix at pages 7a and 9a. On May 25, 1976, the Temporary Emergency Court of Appeals entered an *ex parte* order accepting the filing of the modified notice of appeal.

On July 8, 1976, the Temporary Emergency Court of Appeals vacated the *ex parte* order, refused to accept a transfer from the Ninth Circuit and entered its order dismissing the appeal. The order stated that the matter was controlled by two cases theretofore decided by that court. *Reed* v. *Kroger Co.*, 478 F.2d 1268 (TECA 1973), and *United States* v. *Cooper*, 482 F.2d 1393 (TECA 1973).

REASONS FOR GRANTING THE WRIT

I. The decision of the Court of Appeals in this case is in conflict with decisions of other courts of appeals.

First. The Court of Appeals for the Ninth Circuit has held that an appeal in a case brought under the Economic Stabilization Act of 1970 should be transferred to the Temporary Emergency Court of Appeals when the notice of appeal was timely filed but erroneously misdirected to the Court of Appeals for the Ninth Circuit. In this and in one other case the Temporary Emergency Court of Appeals has held that such appeals should not be transferred. In both cases it held that it had no jurisdiction, refused to accept a transfer from the Ninth Circuit, and dismissed the appeal.

In *United States* v. *Cooper*, 482 F.2d 1393 (TECA 1973), the United States District Court for the Central District of California entered two judgments in one case, one imposing civil penalties for violations of the Economic Stabilization Act of 1970 and the other imposing a criminal penalty of probation for making false statements in violation of a different federal statute. The defendant filed one notice of appeal in the District Court. The Court of Appeals for the Ninth Circuit entered an order transferring the entire appeal to the Temporary Emergency Court of Appeals. The Temporary Emergency Court of Appeals held that it had no jurisdiction of the criminal conviction because it did not involve the Economic Stabilization Act. It returned that matter to the Ninth Circuit. It held that as to the civil penalties arising under the Stabilization Act, it had "no jurisdiction" because the appellant "failed to file a timely appeal with the TECA." 482 F.2d at 1400.

In this case the Temporary Emergency Court of Appeals held that it was bound by its decision in the *Cooper* case and it refused to accept a transfer from the Ninth Circuit.

These decisions of the Temporary Emergency Court of Appeals are in direct conflict with the decision of the Ninth Circuit in the *Cooper* case. This Court should resolve that conflict and establish a uniform rule either permitting or refusing to permit a transfer from an improper court of appeals to the proper court of appeals.

Second. The uniform rule in this Court and among the courts of appeals of the various circuits is that a notice of appeal is sufficient to invoke the jurisdiction of the court of appeals if it is timely filed even though it is filed in the wrong court. In this case, in the *Cooper* case, and in *Reed* v. *Kroger Co.*, 478 F.2d 1268 (TECA 1973), the Temporary Emergency Court of Appeals has held that it has no jurisdiction of an appeal when the notice of appeal, although timely filed, was filed in the wrong court.

In *Reed* v. *Kroger Co.*, *supra*, a judgment was entered by the United States District Court for the Southern District of Indiana on October 18, 1972. On November 15, 1972, the appellant delivered to the Clerk of the District Court for the Southern District of Indiana a notice of appeal to the Temporary Emergency Court of Appeals. On January 29, 1973, the appellant filed a notice of appeal with the Temporary Emergency Court of Appeals with a motion that it be accepted nuc pro tunc. The Temporary Emergency Court of Appeals held that the failure to file the notice of appeal in the Temporary Emergency Court of Appeals within the thirty-day period required was fatal and dismissed the appeal.

In *Yanow* v. *Weyerhaeuser Steamship Co.*, 274 F.2d 274, 282-83 (9th Cir. 1959), cert. denied, 356 U.S. 957 (1958), and *Pasternack* v. *Comm. of Internal Revenue*, 478 F.2d 588, 593 (D.C. Cir. 1973), the courts said:

> "There is a considerable body of authority indicating that in determining whether an attempted appeal has been accomplished, most informally drawn papers and improperly labelled documents have been sufficient to accomplish the apparent objective of taking an appeal . . .
>
> . . .
>
> "The rationale of the cases relating to informal or irregular appeals is that notwithstanding the papers filed are inaptly worded or labelled, or even failed to use the word 'appeal' or *were filed in the wrong court*, yet they sufficed to show the parties intended to appeal." (Emphasis added.)

Federal Rule of Appellate Procedure 3(a) states:

> "Failure of an appellant to take any steps other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal."

That rule has been interpreted to mean that an appeal is valid when the notice of appeal was filed within the time permitted, even though it was filed in the wrong court.

Erroneous filing of a notice of appeal with the court of appeals within the 30 days permitted (when the rule requires filing in the district court) has been held to be sufficient to effect an appeal and to invoke the jurisdiction of the court of appeals. *Ritchie* v. *Wilkins*, 335 F.2d 1 (2d Cir. 1964). A letter written to a judge of the court of appeals (when a notice should have been filed in the district court) has been held to be effective as a duly filed notice of appeal when it was filed within the time permitted. *Riffle* v. *United States*, 299 F.2d 802 (5th Cir. 1962).

Blunt v. *United States*, 100 U.S. App. D.C. 266, 244 F.2d 355, 359 (1957); *Gerringer* v. *United States*, 93 U.S. App. D.C. 403, 213 F.2d 346 (1954); and *West* v. *United States*, 94 U.S. App. D.C. 46, 222 F.2d 774 (1955), all held that there was "a sufficient notice of appeal although the paper was labelled a motion for leave to appeal in forma pauperis and in each case *the document was filed in the wrong court.*" *Yanow* v. *Weyerhaeuser Steamship Co.*, 274 F.2d 274, 282, n.12, (9th Cir. 1959), *cert. denied*, 356 U.S. 957 (1958). (Emphasis added.)

If uniform principles are applied throughout the system of federal courts, the erroneous filing of a notice of appeal in the United States District Court whose judgment is appealed from (when the rules require the notice of appeal be filed with the court appealed to) should be no less fatal than the erroneous filing of a notice of appeal with the United States Court of Appeals that is appealed to (when the rules require that the notice be filed with the court appealed from).

In *Reconstruction Finance Corp* v. *Prudence Sec. Advisory Grp.*, 311 U.S. 579 (1941), the petitioner filed a notice of appeal in the District Court when the statute required that it be filed in the Court of Appeals. The Court of Appeals for the Second Circuit dismissed the appeal. This Court reversed, stating:

> "Normally the Circuit Court of Appeals would be wholly justified in treating the mere filing of a notice of appeal in the District Court as insufficient. But the defect is not jurisdictional in the sense that it deprives the court of power to allow the appeal. The court has discretion, where the scope of review is not affected, to disregard any such irregularity in the interest of substantial justice . . . . In this case the effect of procedural irregularity was not substantial. The scope of review was not altered. There was no question of the good faith of petitioners, of

> dilatory tactics, or of frivolous appeals . . . . The failure to comply with statutory requirements . . . . is not necessarily a jurisdictional defect." 311 U.S. at 582-83.

This difference between the decisions of the Temporary Emergency Court of Appeals and those of the circuit courts is not justified by any difference in the language of the applicable statutes or rules of procedure. The language of the rules of appellate procedure, the Economic Stabilization Act, and the rules of the Temporary Emergency Court of Appeals is virtually identical insofar as it prescribes the time and the place for filing a notice of appeal.

The decisions of the Temporary Emergency Court of Appeals are in direct conflict with decisions of all other courts of appeals that hold that a notice of appeal is effective if it is timely filed even if it is filed in the wrong court.

This Court should resolve this conflict by establishing a uniform rule applicable to all appeals and all courts of appeal and stating whether the timely filing of a notice of appeal is or is not effective if it is filed in the wrong court.

II. The decision of the Court of Appeals is in conflict with decisions of this Court.

This Court has held that when a district court causes an appellant to believe that he has more than the permitted time for filing an appeal, unique circumstances exist and the appeal is effective even if the notice of appeal is not filed in time. *Thompson* v. *Immigration and Naturalization Service*, 375 U.S. 384 (1964); *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962).

In this case the petitioner was misled by two inconsistent United States Statutes.

28 U.S.C. § 1291 states:

> "The courts of appeal shall have jurisdiction of appeals from *all* final decisions of the district courts of the United States . . . . except where a direct review may be had in the Supreme Court." (Emphasis added.)

28 U.S.C. § 1294 provides:

> "Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:
>
> "(1) From a district court of the United States to the court of appeals for the circuit embracing the district;"

There is no exception in this statute indicating that appeals from any district court judgment should be taken to any court of appeals other than the one in the circuit embracing the district court whose judgment is appealed from. When Congress granted to the Temporary Emergency Court of Appeals the exclusive jurisdiction to hear appeals from district court decisions involving the Economic Stabilization Act of 1970, it did not amend or provide an exception to 28 U.S.C. § 1291 or § 1294.

When Congress has considered the matter, it has provided that cases filed in improper courts may be transferred to proper courts. See 28 U.S.C. § 1506 providing for transfer of cases from the court of claims to the district court. But, in this case, Congress inadvertently created a trap that has resulted in the filing of a notice of appeal in the wrong court. These circumstances are unique to the same extent as those in the *Thompson* and *Harris* cases and should be sufficient to permit the Temporary Emergency Court of Appeals to retain jurisdiction.

III. This Court should decide the question presented in this case because of its importance to the proper and uniform administration of appellate procedure in the federal courts.

Uniform principles should apply to rules of procedure in all United States courts of appeals. The Federal Rules of Appellate Procedure apply in the Temporary Emergency Court of Appeals except where matters are specifically covered by that court's own rules. The Temporary Emergency Court of Appeals has no rule contrary to Federal Rule of appellate Procedure 3(a) which states:

> "Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal . . . ."

No reason appears from the language of the applicable statutes or rules of procedure that would justify application of different principles in the Temporary Emergency Court of Appeals than those that are applied in the circuit courts.

If different principles should apply, such a rule should be established by a decision of this Court.

There are several circumstances in which a party might seek review in the wrong United States court of appeals. The statute providing for review of administrative rules published by the Federal Energy Administration states that review of rules of national applicability can be obtained only in the Court of Appeals for the District of Columbia, and that review of rules that are not of national applicability can be obtained only in the Court of Appeals for the appropriate circuit. Federal Energy Administration Act of 1974, 15 U.S.C. § 766(i)(2)(A). The Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 754(a)(1), incorporates § 211 of the Economic Stabilization Act of 1971 and provides that the Temporary Emergency Court of Appeals has exclusive jurisdiction to review district court judgments involving that statute. Thus, the problem existing in this case may continue to arise. This Court should, to the extent possible, establish that timely filing of a notice of appeal in the wrong court is or is not fatal to the appeal, that transfers from an improper to a proper court will or will not be permitted, and that uniform principles are or are not to be applied when determining jurisdictional questions in all the courts of appeal.

CONCLUSION

For the reasons stated, the Petition for Certiorari should be granted.

Respectfully submitted,

ROBERT J. MILLER
TERRY DESYLVIA
BLACK, KENDALL, TREMAINE,
BOOTHE & HIGGINS
1300 S.W. Fourth Avenue
Portland, Oregon 97201

APPENDIX

APPENDIX

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 9-33

No. 9-34

H. A. ANDERSEN CO., INCORPORATED, ET AL.,
Plaintiffs-Appellees, Cross-Appellant,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 701,
Defendant-Appellant, Cross-Appellee.

Appeal from the United States District Court for the District of Oregon

(Civ. 72-726)

Terry DeSylvia, Black, Kendall, Tremaine, Boothe & Higgins, Portland, Oregon, for the Appellant.

Michael G. Holmes, Dezendorf, Spears, Lubersky & Campbell, Portland, Oregon, for the Appellees.

ORDER

Before CARTER, CHRISTENSEN and ESTES, Circuit Judges

This case is controlled by prior decisions of this court, Reed v. Kroger Co. (T.E.C.A. 1973), 478 F.2d 1268, and United States v. Cooper (T.E.C.A. 1973), 482 F.2d 1393.

The motion of the plaintiffs to vacate the order of May 25, 1976, allowing the defendant's out-of-time filing of a notice of appeal in No. 9-33 is granted.

The motion of the plaintiffs to dismiss the defendant's appeal in No. 9-33 is granted. Accordingly, the plaintiffs cross appeal in No. 9-34 is also dismissed.

July 8, 1976

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 76-1816

H. A. ANDERSEN CO., INCORPORATED, ET AL.,
Plaintiffs-Appellees,

vs.

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL UNION NO. 701,
Defendant-Appellant.

MOTION TO TRANSFER

Defendant-appellant, International Union of Operating Engineers, Local Union No. 701, moves this court:

I.

To transfer this appeal to the United States Temporary Emergency Court of Appeals in Washington, D.C.

II.

To withhold any decision on plaintiffs-appellees' motion to dismiss the file herein pending a decision by the United States Temporary Emergency Court of Appeals as to whether that court would accept the transfer of this appeal.

In support of this motion, defendant-appellant will rely on the affidavit of Terry DeSylvia, one of the attorneys for defendant-appellant, attached hereto as Exhibit "A,"

together with points and authorities cited in its reply to appellees' motion to dismiss this appeal.

Respectfully submitted,

/s/ Terry DeSylvia
TERRY DESYLVIA
BLACK, KENDALL, TREMAINE, BOOTHE & HIGGINS

Attorneys for Defendant-Appellant

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 76-1816

H. A. ANDERSEN CO., INCORPORATED, ET AL.,
Plaintiffs-Appellees,
vs.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 701,
Defendant-Appellant.

AFFIDAVIT

STATE OF OREGON,)
) ss.
COUNTY OF MULTNOMAH)

I, TERRY DeSYLVIA, being first duly sworn, on oath depose and say:

That I am one of the attorneys for the defendant-appellant (Local 701) in the above-entitled case. On March 2, 1976, judgment was entered against Local 701 herein. Up to the time of judgment, I had not participated in the defense of this matter. Following the entry of the judgment, I was requested to contact Local 701 to ascertain whether an appeal was to be made. I did this and it was determined that an appeal should be filed. The judgment order from which the appeal was taken made no mention of the Economic Stabilization Act of 1970 or the Temporary Emergency Court of Appeals. Having had experience in effecting appeals from the United States District Court for the District of Oregon to its regular appellate court, the Ninth Circuit Court of Appeals, I directed the appeal in this case to said appellate division of the Federal Court system. On

March 24, 1976, the notice of appeal was timely filed in the regular course with the clerk of the United States District Court for the District of Oregon.

Within fourteen days after filing said notice, plaintiffs-appellees filed in this court a notice of cross-appeal from the same judgment. On May 10, 1976, I received service of a motion filed by plaintiffs-appellees to dismiss this appeal on the grounds that this court lacks jurisdiction and that the appeal properly should have been taken to the Temporary Emergency Court of Appeals. Because plaintiffs-appellees delayed filing the motion to dismiss for a period of sixty days, there was no opportunity to seek relief under Rule 4(a), Federal Rules of Appellate Procedure.

TERRY DESYLVIA
Terry DeSylvia

Subscribed and sworn to before me this 18 day of May, 1976.

ELIZABETH A. MOORE
Notary Public for Oregon
My commission expires: 6/17/79

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

TECA Docket No.

District Court No. 72-726

H. A. ANDERSEN CO., INCORPORATED, GORDON H. BALL, INC., GENERAL CONSTRUCTION COMPANY, W. H. GREGORY COMPANY, HANNAN BROS. CONSTRUCTION, INC., PETER KIEWIT SONS' CO., MATICH CONSTRUCTORS, ROGERS CONSTRUCTION, INC., WESTERN PACIFIC PILEDRIVING CO., WHITE BROS. CONSTRUCTION CO., INC. AND WILLARD R. ROGERS AND DONALD C. ROGERS, DBA ROGERS CONSTRUCTION CO.,

Plaintiffs-Appellees

vs.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 701,

Defendant-Appellant.

MOTION TO THE
TEMPORARY EMERGENCY COURT OF APPEALS

The International Union of Operating Engineers, Local No. 701, defendant-appellant, moves this court to allow the filing of the modified notice of appeal set forth in Exhibit 1 attached, or in the alternative, to accept a transfer of the appeal filed in the United States Court of Appeals for the Ninth Circuit on March 24, 1976, entitled "H. A. Andersen Co., Inc., et al, plaintiff-appellees, vs. International Union of Operating Engineers, Local No. 701, defendant-appellant," in the United States Court of Appeals for the Ninth Circuit, Registry No. 76-1816.

This motion is based on the notice of appeal attached as Exhibit 1, the statement in supplement to notice of

appeal attached as Exhibit 2, the affidavit of Terry DeSylvia attached as Exhibit 3, and the memorandum of points and authorities submitted herewith.

/s/ Terry DeSylvia
TERRY DESYLVIA
BLACK, KENDALL, TREMAINE, BOOTHE & HIGGINS
3100 First National Bank Tower
Portland, Oregon 97201

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

TECA Docket No.

District Court No. 72-726

H. A. ANDERSEN CO., INCORPORATED, GORDON H. BALL, INC., GENERAL CONSTRUCTION COMPANY, W. H. GREGORY COMPANY, HANNAN BROS. CONSTRUCTION, INC., PETER KIEWIT SONS' CO., MATICH CONSTRUCTORS, ROGERS CONSTRUCTION, INC., WESTERN PACIFIC PILEDRIVING CO., WHITE BROS. CONSTRUCTION CO., INC. AND WILLARD R. ROGERS AND DONALD C. ROGERS, DBA ROGERS CONSTRUCTION CO.,

Plaintiffs-Appellees,

VS.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 701,

Defendant-Appellant.

MODIFIED NOTICE OF APPEAL

Notice is hereby given that International Union of Operating Engineers, Local No. 701, defendant-appellee above named, hereby appeals to the Temporary Emergency Court of Appeals of the United States from the final judgment awarding compensatory damages, attorneys' fees and punitive damages entered in this action on the 2nd day of March, 1976, by Judge James M. Burns in the District Court for the District of Oregon.

This notice is a modification of the notice of appeal from the judgment herein filed on March 24, 1976 in the United States Court of Appeals for the Ninth Circuit.

DATED this 24 day of May, 1976.

/s/ Terry DeSylvia
TERRY DESYLVIA
BLACK, KENDALL, TREMAINE, BOOTHE & HIGGINS
3100 First National Bank Tower
Portland, Oregon 97201

Supreme Court, U. S.
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In the Supreme Court
of the United States

OCTOBER TERM, 1976

No. 76-170

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 701,
Petitioner,

v.

H. A. ANDERSEN CO., INCORPORATED, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

MICHAEL G. HOLMES
520 S. W. Yamhill Street
800 Pacific Building
Portland, Oregon 97204
Counsel for Respondents

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 9-76

In the Supreme Court
of the United States

OCTOBER TERM, 1976

No. 76-170

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 701,
Petitioner,

v.

H. A. ANDERSEN CO., INCORPORATED, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

QUESTION PRESENTED

Respondents disagree with petitioner's statement of the question. Respondents suggest that if review were granted the question would be: May the Temporary Emergency Court of Appeals dismiss an appeal not made to it within the time restricted by the Economic Stabilization Act, at least when there was not shown compelling good cause for not complying with the statute?

THE PETITION SHOULD BE DENIED

There are no important reasons for the Court to grant review. Granting the petition would draw the Court into examining the permissibility of a dismissal of an appeal filed untimely to the Temporary Emergency Court of Appeals (TECA), wherein the governing requirements were fixed by a temporary statute, and wherein there was not shown to the TECA good cause for noncompliance. The matter was not controlled by the Federal Rules of Appellate Procedure. The decision does not affect the course of decisions in cases controlled by the federal rules of procedure and not by this temporary statute.

In the Economic Stabilization Act of 1970, as amended, (85 Stat. 743, 749-750 (1971), 12 U.S.C. § 1904 note) Congress specially fixed the method and time for invoking the appellate jurisdiction of the TECA. In Section 211 of the Act, Congress declared that an appeal from a district court must be filed with the TECA within thirty days of judgment and reinforced this declaration by insisting that "any affected party seeking relief shall be required to follow the procedures of this title." (See appendix pages A16, A17, *infra.)* Thus Congress expressed the requirements with unusual firmness. Congress made no exception for the TECA to hear an appeal not filed there in time, nor for an appeal to another court to be "modified" or "transferred" out of time to become an appeal to the TECA.

In the present case the petitioner did not appeal

to the TECA until 83 days after judgment. Since the appeal did not comply with the firmly expressed statute, dismissal conformed to the congressional mandate.

The TECA has repeated the statutory prerequisites in its own Rule 15(a) (in previous years published as Rule 16(a)), and gave them effect in published decisions in *Reed* v. *Kroger Co.*, 478 F.2d 1268 (T.E.C.A. 1973), and *United States* v. *Cooper*, 483 F.2d 1393, 1399-1400 (T.E.C.A. 1973).

There is not a conflict on this matter between the decisions of the TECA and decisions of other courts of appeals. No other court of appeals has jurisdiction of appeals under Section 211(b)(2) or (e)(2). No other court of appeals can decide whether the TECA shall hear an appeal which fails to comply with those requirements of the Act or the TECA's Rule 15(a), and no other court of appeals has purported to do so.

The petition exaggerates in claiming the Ninth Circuit to be in conflict with the TECA. The Ninth Circuit's actions in *United States* v. *Cooper* should be understood as first, in March of 1973, recognizing that it lacked subject matter jurisdiction to review a judgment under the Economic Stabilization Act but attempting expediently to transmit the appeal, record and briefs to the TECA for such disposition as it would make (482 F.2d at 1396), and thereafter, in 1974, acquiescing in the TECA's disposition. See *United States* v. *Cooper*, 501 F.2d 1089, fn. 1 at 1090 (9th Cir. 1974). The Ninth Circuit has not purported

to decide that the TECA must entertain an appeal not timely made to the TECA.

Furthermore, the TECA's decisions are not in conflict with the other courts of appeals decisions cited in the petition pages 7 to 9, for the fundamental reason that the TECA necessarily was deciding under a statute by which those other courts were not affected.

Another reason that petitioner's citations do not demonstrate a conflict is that none of those cases held that a court of appeals is *required* to hear an appeal in circumstances like this case. The passages quoted from the *Yanow* case were dicta (274 F.2d at 281-283); and each of the other cases cited on pages 7 to 9 concerned efforts by a *pro se*, lay litigant. Each of those laymen filed in time in the correct place or applied in time to the correct appeal court. But in the present case, counsel did not timely file anything in the TECA, and they did not timely present anywhere any notice of intention to appeal to the TECA. (Counsel appealed to the Ninth Circuit, and they still are seeking to proceed in the Ninth Circuit by arguing that it has some subject matter jurisdiction.) See further on the circumstances appendix pages A2, A5-A18, *infra*.

Nor does the TECA's decision conflict with decisions of this Court. There are no conflicting decisions by this Court under the terms of the Economic Stabilization Act. Petitioner refers to decisions made in other contexts: *Thompson* v. *Immigration and Naturalization Service*, 375 U.S. 384 (1964), *Harris Truck*

Lines, Inc. v. *Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962), and *Reconstruction Finance Corp.* v *Prudence Securities Advisory Group*, 311 U.S. 579, 582-583 (1941). But none of them matches this case. They permitted belated appeals because of unique circumstances wherein the appellants were misled by court assurances or court decisions on which they relied. In both *Reed* and *Cooper*, the TECA announced willingness to make an exception if it were shown unique circumstances of compelling excuse, but such was not shown. *Reed* v. *Kroger Co.*, *supra*, 478 F.2d at 1271-1272; *United States* v. *Cooper*, 482 F.2d at 1399-1400. In the present case no good cause for noncompliance was shown to the TECA. See appendix pages A5-A18, *infra*.

Petitioner does not bring itself under *Thompson* or *Harris Truck Lines* by arguing now that it was "misled by" 28 U.S.C. §§ 1291 and 1294, which petitioner did not argue in the TECA. Counsel did not show such in fact to the TECA; the record does not support the argument. Furthermore, the mere existence of 28 U.S.C. §§ 1291 and 1294 does not make this case into one like *Thompson* or *Harris Truck Lines*. Petitioner's attorneys knew this case came under the Economic Stabilization Act. That Act told them when and where to file an appeal to the TECA, and the petitioner's own trial memorandum had set out Section 211 in full text. No court decision or court assurance told them that they need not appeal to the TECA within thirty days. Rather, the Act, the TECA's Rules, the *Reed* case and the *Cooper* case all stated

simply and clearly the time and place to file an appeal if petitioner desired to appeal to the TECA. The TECA recognizes that inattention by lawyers to those requirements does not excuse noncompliance:

> ". . . We are unable to conclude that counsel's failure to acquaint himself with the basic requirement for the filing of his client's notice of appeal can properly be described as constituting 'unique circumstances' or 'all that could reasonably be expected.' Indeed, unfamiliarity with local practice does not even constitute 'excusable neglect,' let alone satisfy the higher standard recognized by the Supreme Court. * * *" *Reed* v. *Kroger Co.*, *supra*, 478 F.2d at 1272.

This Court has dismissed appeals in order to give effect to a statutory mandate or to enforce its own rules. *Matton Steamboat Co.* v. *Murphy*, 319 U.S. 412 (1943), dismissed appeals for failure to meet precisely a time limit imposed by statute, even though the appellants had made an earlier, timely attempt. In *Pittsburgh Towing Co.* v. *Mississippi Valley Barge Line Co.*, 385 U.S. 32 (1966), and *Shapiro* v. *Doe*, 396 U.S. 488 (1970), appeals which had been timely filed were dismissed for appellants' failure to docket the appeals within the time prescribed by this Court's Rule 13. *Pittsburgh Towing* held that "a misunderstanding between counsel for appellant" was not sufficient cause. *Shapiro* apparently held that inadvertence by counsel was not sufficient cause.

CONCLUSION

This case involves special provisions of a temporary statute. Neither the TECA nor this Court may disregard or rewrite the statute. The decision was not controlled by the Federal Rules of Appellate Procedure, and the decision will not affect cases controlled by those rules which govern most cases in courts of appeals. The decision does not present an occasion for the Court to devise "uniform principles" (which petitioner suggests) for all appeals irrespective of plainly different provisions formulated and enacted by Congress.

There is not a conflict of decisions on the matter which is the subject of the petition. The situation is not likely to occur often, and if it were to recur it would not be with good cause.

There are neither important nor suitable reasons for the Court to undertake review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

MICHAEL G. HOLMES
Counsel for Respondents

APPENDIX

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

H. A. ANDERSEN CO., INCORPORATED, et al,

Plaintiffs-Appellees,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 701,

Defendant-Appellant.

No. 9-33

MOTION TO DISMISS DEFENDANT'S APPEAL

The Plaintiffs hereby move for an order dismissing Defendant's appeal.

The grounds of this motion are that Defendant did not comply with Section 211 of the Economic Stabilization Act of 1970, as amended (Public Law 92-210, 85 Stat. 743); that Defendant did not effectively invoke this Court's jurisdiction, since Defendant did not file an appeal in and to this Court and timely; and that Defendant did not comply with Rule 15(a) of the General Rules of this Court.

In support of this motion, Plaintiffs submit the following points and authorities, and the affidavit of Michael G. Holmes accompanying this motion.

POINTS AND AUTHORITIES

1. This is a damage action by several companies

on account of labor strike activities in June of 1972 conducted by Defendant at many locations in Oregon and Washington. As the District Court found, Defendant thereby was trying to compel employers to pay wage increases in amounts not permitted under federal wage controls (Phase Two). The District Court found that Defendant had acted in deliberate and willful violation of federal wage controls orders and regulations, so Plaintiffs obtained judgment on claims arising under the Economic Stabilization Act. The date of the judgment entry was March 2, 1976. Defendant did not appeal to this Court within 30 days thereafter.

Section 211 of the Economic Stabilization Act created this Court, defines its jurisdiction and prescribed how that jurisdiction can be invoked. Congress established that any appeal in a case like this "shall be taken by the filing of a notice of appeal with the Temporary Emergency Court of Appeals within thirty days of the entry of judgment by the district court." Section 211(b)(2); see also Section 211(e)(2). The command is reinforced by Section 211(h): "* * * Any affected party seeking relief shall be required to follow the procedures of this title."

Since Defendant did not do what Section 211 requires for invoking this Court's jursdiction, the Court cannot entertain Defendant's appeal. Defendant's opportunity for an appeal, and this Court's authority, both are provided and limited by Section 211. The statute cannot be rewritten by a court.

Nor may the statute be subverted by Defendant's maneuvre of sending to this Court, 83 days after judgment, a motion to allow filing of a document Defendant describes as "a modification of" a notice of appeal to the Ninth Circuit filed in the District Court, or alternatively to "accept a transfer" of Defendant's appeal to the Ninth Circuit. Regardless of that camouflage, Defendant did not file an appeal *to* this Court or *in* this Court *within* 30 days after judgment.

2. Here dismissal is required not only by the mandate of Section 211 but also by this Court's precedents of *Reed* v. *Kroger Co.*, 478 F2d 1268 (TECA 1973), and *United States* v. *Cooper*, 482 F2d 1393 (TECA 1973), both of which dismissed appeals for being sent out of time to this Court. In *Reed* the appellant's counsel wrote a notice of appeal to this Court but filed it in the district court; and two months later he filed a notice of appeal in this Court, which the Court first allowed to be filed upon a motion but thereafter dismissed, also vacating the order which had allowed the filing. 478 F2d at 1270 (fn. 5) and 1272 (fn. 7). In *Cooper* the appeal arrived here by a "transfer" from the Ninth Circuit long after the time Section 211 fixes for filing here; the Chief Judge made an order permitting the filing here, but upon further consideration this Court dismissed the appeal. 482 F2d at 1399-1400.

The opinions in *Reed* and *Cooper* show that the decisions to dismiss were carefully considered, and in total six judges of this Court so ruled without a dissent.

Defendant's effort to appeal here rests on Defendant's request that this Court repudiate *Reed* and *Cooper*. The Court should not do so. Both of those decisions were correct in dismising appeals which did not meet the prerequisites fixed by Section 211. Since those prerequisites are statutory, Defendant cannot validly attack the *Reed* and *Cooper* dismissals by referring to cases wherein courts found compelling justification to excuse noncompliance with court-made rules of procedure. Every case cited in Defendant's Memorandum, other than *Reed* and *Cooper*, involved noncompliance with a court-made rule only, part of the Federal Rules of Civil Procedure or part of the Federal Rules of Appellate Procedure. Those rules permit some deviations if not in conflict with a statute. But even when only the rules are involved, it cannot be said that all one need do to appeal is to make a clear assertion in some court of his desire to appeal. See, e.g., *Smith* v. *United States*, 425 F2d 173 (9 Cir. 1970), which dismissed an appeal wherein appellant promptly had announced in open court and on the record his desire to appeal, but his counsel did not file a written notice of appeal until after the time fixed by rule; and the court cited similar cases. Though the rules permit courts, for good cause shown, to allow some deviations from rules, they do not sanction disregard of prescriptions of a statute. On the contrary, Rule 1(b), F.R.A.P., says, "These rules shall not be construed to extend or limit the jurisdiction of the courts of appeals as established by law."

The significance of the distinction, between re-

quirements set by statute and requirements declared in court-made rules, is acknowledged in arguments by the author Defendant cited. 9 Moore's Federal Practice, ¶ 204.02[2] (2d ed. 1975). More important, here the statute not only specially proclaims the time and place in which an appeal shall be filed, but also in the same section it demands explicitly that any party seeking relief "shall be required to follow the procedures of this title" (Section 211(h)).

3. Even if, despite the statute, it were supposed that a party's failure to file with this Court a notice of appeal within 30 days of the judgment could be ignored if there are "unique circumstances" of the sorts found in some Supreme Court cases (which did *not* involve requirements fixed by statute), Defendant would not qualify. Defendant was not misinformed or misled by the District Court (see *United States* v. *Cooper*, 482 F2d at 1399-1400), and Defendant is not an unrepresented, ill, imprisoned layman who did "all that could reasonably be expected" to appeal timely to the correct court (see *Reed* v. *Kroger*, 478 F2d at 1271).

Or, even if the statute permitted (which it does not) excusing upon good cause shown a failure to file notice of appeal in this Court within 30 days after the judgment, good cause is not shown in this case. *Reed* pointed out that a lawyer's failure to learn the Court's rule (or the statute it mirrors) on time and place to file is not excusable. 478 F2d at 1269, 1271-1272. And the Supreme Court has held that "a misunderstanding between counsel for appellant" did

not excuse docketing an appeal after the time stated in a Supreme Court rule. *Pittsburgh Towing Co.* v. *Mississippi Valley Barge Line Co.*, 385 US 32, 17 L Ed 2d 31, 87 S Ct 195 (1966). [Supplemented June 9, 1976 to say, "Also, see *Shapiro* v. *Doe*, 396 US 488, 90 S Ct 641, 24 L Ed 2d 677 (1970); *Harlan* v. *Graybar Electric Co.*, 442 F2d 425 (9 Cir. 1971) (per curiam); *Ray* v. *Morris*, 170 F2d 498 (7 Cir. 1948)."]

Defendant's memorandum cites several cases, but (in addition to the fact that they do not involve a statute like Section 211) none of them holds that a court is required to, or ought to, hear an appeal in circumstances like this case.

Mr. DeSylvia's affidavit does not show compelling good cause. It speaks of only one of Defendant's lawyers. It seems to complain that the judgment did not mention the Economic Stabilization Act or the Temporary Emergency Court of Appeals; but judgments normally do not mention statutes and almost never mention higher courts. The affidavit does not deny he was otherwise informed that the case involves the Economic Stabilization Act, or deny availability of the papers which cited the Act, such as the complaint, pretrial order, the District Court's opinion, the District Court's additional findings and conclusions entered on the same day as the judgment, and the briefs of the parties (some of which also cited this Court, and one of which, Defendant's Trial Memorandum, reproduced in full Sections 210 and 211 of the Act).

Defendant and its attorneys have known since their first contact with this case that it is brought under the Economic Stabilization Act, and they had the opportunity provided by Congress to appeal to this Court within 30 days, and Defendant's attorneys do not (and cannot) assert ignorance of the Act and this Court. The Court should reject Defendant's late, unwarranted effort to transform (by "modification," "liberal construction" or "transfer") Defendant's invalid appeal to the Ninth Circuit into something it is not, an appeal to this Court to be heard here. [Supplemented June 9, 1976 to say, "See *Cook and Sons Equipment, Inc.* v. *Killen*, 277 F2d 607, 609 (9 Cir. 1960); *Penwell* v. *Newland*, 180 F2d 551 (9 Cir. 1950); *In re McIntosh*, 95 F2d 627 (9 Cir. 1938), motion denied 304 US 551, 58 S Ct 1050, 82 L Ed 1522, cert. denied 304 US 580, 58 S Ct 1060, 82 L Ed 1542 (1938)."]

CONCLUSION

Defendant's appeal should be dismissed. The order dated May 25, 1976, allowing Defendant's "Modified Notice of Appeal" should be vacated, and Defendant's Motion to allow the filing or to accept a "transfer" should be denied.

Respectfully submitted,

/s/ *Dezendorf, Spears, Lubersky & Campbell*

/s/ *Michael G. Holmes*
DEZENDORF, SPEARS, LUBERSKY
& CAMPBELL
MICHAEL G. HOLMES
Attorneys for Plaintiffs-Appellees

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

H. A. ANDERSEN CO., INCORPORATED, et al,

Plaintiffs-Appellees,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 701,

Defendant-Appellant.

No. 9-33

AFFIDAVIT

STATE OF OREGON)
) ss.
County of Multnomah)

I, MICHAEL G. HOLMES, being first duly sworn, depose and say as follows:

I am an attorney for the plaintiffs in the above-entitled case, and I have been such since the case was commenced in 1972. I make this affidavit in support of plaintiffs' Motion To Dismiss Defendant's Appeal and Motion To Vacate. Also, I make this affidavit out of concern that otherwise Mr. DeSylvia's affidavit of May 24, 1976 might be thought to indicate that he and his firm did not have good reason to know the nature of this case and the Economic Stabilization Act.

Mr. DeSylvia's affidavit makes a comment on content of the judgment order. The form developed in the following manner. On February 5, 1976 the District Court requested that I submit a form of judgment for

the case. On February 6 I submitted to the District Court a form of judgment and a form of additional findings and conclusions, and concurrently supplied copies of the same to Mr. DeSylvia's partner, John J. Higgins, whose name then was appearing on papers presented to the court. On February 9 Mr. Higgins discussed with me and with the court some requests or suggestions he had regarding form of additional findings and conclusions and the form of judgment. On February 24 Judge Burns met in chambers with Mr. Higgins and me, and the subjects of the form of judgment and form of additional findings and conclusions were discussed, and the judge directed me on revisions he desired in those forms. In compliance I submitted to the court on February 25 the form of additional findings and conclusions and the form of judgment which the District Court signed and entered on March 2, 1976. The form of judgment did not mention the Economic Stabilization Act or the TECA, because no reason to mention either of them in the judgment form occurred to me, and no one suggested that either should be mentioned, and in drawing the judgment form I was guided by Form 32 by the United States Supreme Court in the Appendix of Forms to the Federal Rules of Civil Procedure. The manner in which I drew the form was not in any way intended to deceive. The additional findings and conclusions, entered by the Court on the same day as the judgment, mentioned the Economic Stabilization Act at a point therein where it was appropriate to do so; and they did not mention the TECA, because there

was no reason or suggestion to do so. Again, the form was not intended in any way to deceive Mr. DeSylvia or his firm.

Defendant filed in the District Court a notice of appeal to the Ninth Circuit on March 24, 1976. It was puzzling to me, because it seemed to me to be in conflict with Section 211 of the Economic Stabilization Act. I did some preliminary research to determine whether there was a proper ground for defendant to appeal to the Ninth Circuit and to confirm the continued applicability of Section 211. I wondered whether I might in April receive notification from the clerk of the TECA that defendant also had filed an appeal with the TECA. In order to preserve to the plaintiffs the fullest opportunity to present issues on appeal if the Ninth Circuit would hear the case, as a precaution I served and filed a cross-appeal to the Ninth Circuit, but noted therein that it was done without waiving any objection to the defendant's appeal. A copy of that notice is attached hereto and marked Exhibit 1.

My preliminary research indicated to me that defendant's appeal to the Ninth Circuit was improper, as conflicting with Section 211, but I did not conclude research on the point in March or April. I was unsure whether defendant had mailed an appeal to the TECA. I was unsure whether defendant would present some sort of argument that the Ninth Circuit could review the judgment. I was mindful that previously in the case defendant had pressed some argu-

ments which seemed at least as invalid, concerning the Economic Stabilization Act, regulations or orders thereunder. I wondered whether defendant was trying to go to the Ninth Circuit instead of to the TECA to seek a slower calendar or in some hope that the Ninth Circuit might reverse the judgment when the TECA would not. I was uncertain whether defendant's appeal to the Ninth Circuit was a result of strategy or misconception.

The following things indicated to me that it was improbable that the appeal was so taken out of failure by counsel to remember that the Act provides the TECA for appeals: The Economic Stabilization Act has been cited for subject matter jurisdiction and as authorization of the relief sought in many papers filed in this case, including the complaint, the pretrial order and briefs. Briefs by both plaintiffs and defendant filed in the case in 1972, 1974 and 1975 have cited and discussed the Economic Stabilization Act. Both the plaintiffs' Trial Memorandum and the defendant's Trial Memorandum cited decisions by the TECA. Defendant's Trial Memorandum filed May 14, 1974 set forth a photocopy of the Stabilization Act, including Sections 210 and 211 in full. A copy of that portion of Defendant's Trial Memorandum is attached hereto and marked Exhibit 2. In the last week before trial commenced defendant added to the pretrial order, by amendment, new contentions and new issues concerning details of regulations under the Stabilization Act. The Act was cited in many exhibits. The District Court's opinions (May 28, 1974 and December

16, 1975) referred to the Stabilization Act and made it plain that the case was decided under the Stabilization Act and orders and regulations pursuant thereto. A copy of the December opinion is attached hereto and marked Exhibit 3. Although defendant originally was represented by another firm of attorneys, defendant's present counsel, Black, Kendall, Tremaine, Boothe & Higgins, have been the attorneys of record for the case since November 14, 1974. It was and is my understanding that Black, Kendall, Tremaine, Boothe & Higgins received the previous attorneys' copies of the documents filed or received in the case. Since November 14, 1974 service of papers in the case has been made upon Black, Kendall, Tremaine, Boothe & Higgins, and they have presented all briefs and arguments since then on behalf of the defendant. The substitution of attorneys made November 14, 1974 was signed for Black, Kendall, Tremaine, Boothe & Higgins by Stuart A. Hall, a partner of that firm who had spent at least a year during the federal economic controls program serving on the staff of the Pay Board, and who is well acquainted with the Economic Stabilization Act and the function of the TECA. Mr. Hall was active in this case at least between November, 1974 and February, 1975, after which his part is not known to me. In written and oral arguments in 1975 and 1976 Mr. DeSylvia's partner, John J. Higgins, has referred repeatedly to the Economic Stabilization Act, and in his 1975 brief discussed the TECA's *McGuire Shaft & Tunnel* decision. He has given detailed attention to the defense of the case and

the proceedings in 1975 and 1976. I presume that Black, Kendall, Tremaine, Boothe & Higgins at the time they decided on appealing from the judgment had possession of copies of the papers referred to above and that Mr. DeSylvia was informed the case involves the Economic Stabilization Act, and I have no reason to believe otherwise. Mr. Hall and Mr. Higgins remain members of that firm and available to Mr. DeSylvia for consultation.

From April 20 until May 3, 1976 I was away from the office, and during that time gave no attention to this case.

Although I was uncertain of why defendant appealed to the Ninth Circuit, and although I doubted that such appeal was proper, I believed I had no duty to notify opposing counsel of my doubt; moreover, I believed that my clients' interests in the judgment and its finality prevented me from volunteering my doubt or advice to opposing counsel.

Between May 3 and 7, 1976 I did further research on the appellate jurisdiction, reached the decision that a motion should be made to dismiss defendant's appeal to the Ninth Circuit, and prepared the motion which on May 7 I served and transmitted by mail.

At no time, whether in March, April or May, did I do anything which prevented or was intended to prevent defendant from appealing to the TECA, or from seeking from the District Court a time extension under Rule 4(a), F.R.A.P. (I mention Rule 4(a) because Mr. DeSylvia's affidavit did. I am not as-

suming that defendant actually could have shown excusable neglect.)

I have had no conversation with any lawyer of Black, Kendall, Tremaine, Boothe & Higgins about the form or content or permissible time of any notice of appeal. We have had no conversation on any subject since March 11, prior to any appeal.

/s/ *Michael G. Holmes*
MICHAEL G. HOLMES

SUBSCRIBED AND SWORN TO before me this 3rd day of June, 1976.

/s/ *Kathlyn L. Chiarini*
Notary Public for Oregon

My commission expires: *May* 20, 1978

EXHIBIT 1:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

H. A. ANDERSEN CO., INCORPORATED, GORDON H. BALL, INC., GENERAL CONSTRUCTION COMPANY, W. H. GREGORY COMPANY, HANNAN BROS. CONSTRUCTION, INC., PETER KIEWIT SONS' CO., MATICH CONSTRUCTORS, ROGERS CONSTRUCTION, INC., WESTERN PACIFIC PILEDRIVING CO., WHITE BROS. CONSTRUCTION CO., INC., and WILLARD R. ROGERS AND DONALD C. ROGERS, DBA ROGERS CONSTRUCTION CO.,

Plaintiffs,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 701,

Defendant.

Civil No. 72-726

NOTICE OF APPEAL

Defendant having filed within 14 days prior hereto a notice of appeal from the judgment herein to the United States Court of Appeals for the Ninth Circuit, all Plaintiffs above named hereby give notice, without waiving any objection to appeal by Defendant, that the Plaintiffs hereby cross appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on March 2, 1976.

/s/ *Dezendorf, Spears, Lubersky & Campbell*

/s/ *Michael G. Holmes*
DEZENDORF, SPEARS, LUBERSKY & CAMPBELL
MICHAEL G. HOLMES
Attorneys for Plaintiffs

EXHIBIT 2:

[Exhibit 2 is not reproduced in full in this appendix. Exhibit 2 consisted of the compete text of Economic Stabilization Act Sections 210 and 211, as they were set out in full in pages 43 through 46 of the petitioner's trial memorandum to the district court. Excerpts from Section 211 follow:

"(b) * * *

"(2) Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder. Such appeals shall be taken by the filing of a notice of appeal with the Temporary Emergency Court of Appeals within thirty days of the entry of judgment by the district court.

* * *

"(e) * * *

"(2) Any party aggrieved by a declaration of a district court of the United States respecting the validity of any regulation or order issued under this title may, within thirty days after the entry of such declaration, file a notice of appeal therefrom in the Temporary Emergency Court of Appeals. In addition, any party believing himself entitled by reason of such declaration to a permanent injunction restraining the enforcement, operation, or execution of such regulation or order may file, within the same thirty-day period, a motion in the Temporary Emergency Court of Appeals requesting such injunctive relief. Follow-

ing consideration of such appeal or motion, the Temporary Emergency Court of Appeals shall enter a final judgment affirming, reversing, or modifying the determination of the district court and granting such permanent injunctive relief, if any, as it deems appropriate.

* * *

"(h) The provisions of this section apply to any actions or suits pending in any court, Federal or State, on the date of enactment of this section in which no final order or judgment has been rendered. Any affected party seeking relief shall be required to follow the procedures of this title."]

EXHIBIT 3:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

H. A. ANDERSEN CO., INCORPORATED, et al,

Plaintiffs,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 701,

Defendant.

Civil No. 72-726

OPINION and ORDER

This case involved actions for recovery of damages plaintiffs claim to have suffered by reason of strike activity by the defendant in June of 1972. Plaintiffs' claim was brought under the provisions of Public Law 92-210, the Economic Stabilization Act of 1970, and amendments thereto, particularly § 210 (a).

[The remainder of Exhibit 3 is not reproduced in this appendix.]